Department of Foreign Affairs and International Trade
Ministère des Affaires étrangères et du Commerce international

RETROSPECTIVE ANALYSIS OF THE 1994 CANADIAN ENVIRONMENTAL REVIEW

URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS

November 1999

Canada

The Government of Canada is committed to an integrated approach to economic, social, environmental and foreign policy, and to promoting sustainable development as an integral component of decision making at all levels of our society. The environmental agenda can no longer be separated from the national economic agenda. The federal government, across all departments, must act on this understanding by adopting economic and environmental agendas that converge - it must show leadership and accountability in integrating environmental and economic decisions.

Uruguay Round of MTN: Canadian Environmental Review, 1994.

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EXECUTIVE SUMMARY

This retrospective analysis of the 1994 Canadian Environmental Review of the Uruguay Round is intended to assist in the environmental assessment of a new round of multilateral trade negotiations at the World Trade Organisation (WTO). Canada is conducting a Strategic Environmental Assessment of the new round in three distinct phases.[1] This retrospective analysis represents the work of the first phase. It evaluates the accuracy of the findings of the 1994 Environmental Review to help formulate the methodology for assessing the new round. The second phase will entail the formulation of that methodology and will begin in December 1999 following the WTO Ministerial meeting in Seattle to set the agenda for the new round. The third phase of the SEA will involve the detailed review of environmental issues, according to the parameters established in the methodology, and will be undertaken concurrently with the negotiations over the course of the next few years. Public participation will form an integral component of the second and third phases of the assessment. [2]

Each of the agreements originally assessed in the 1994 Environmental Review are examined in this retrospective. In addition, two new sections have been added to review the work of the WTO Committee on Trade and Environment (CTE) and the effect of recent environment-related trade disputes involving Article XX of the General Agreement on Tariffs and Trade. It is important to note that this retrospective, like the 1994 Environmental Review, focuses on the "regulatory effects" of the Uruguay Round, and in particular does not attempt to estimate the actual physical impacts of the of the Uruguay Round on the environment. The 1994 Environmental Review concluded that "the trade liberalizing effect of the Uruguay Round will promote the more efficient allocation and use of resources and thereby contribute to an increase in production and incomes and to a lessening of demands on the environment."[3] This conclusion was based on the assertion that Canada would retain the right to regulate for environmental protection. This retrospective argues that Canada has indeed maintained its right to regulate for environmental protection. The findings of this retrospective may be summarized as follows:

- Examination of the 1994 Environmental Review of the various agreements concludes that Canada has retained the right to maintain strong environmental policies and regulations.

- Two significant WTO disputes of an environmental nature involving GATT Article XX are discussed to illustrate the nature of a rules-based system and the importance assigned to fair and consistent application of domestic environmental protection measures. Some commentators have argued that these cases limit the right of countries to enact environmental protection legislation. In fact, the decisions do not question the right of WTO Members to establish and implement environmental protection measures, but do underscore that such measures must be consistent with the obligations assumed under WTO agreements.

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1 For more details on the Canadian Strategic Environmental Assessment of the new round of multilateral trade negotiations at the WTO, visit the Department of Foreign Affairs and International Trade's internet site: http://www.dfait-maeci.gc.ca/tna-nac/menu-e.asp

2 Comments received on this Retrospective Analysis will be incorporated into the methodology for assessing the effects of the next round. To provide your comments, visit the internet address noted above.

3 Canada, 1994, p. 35.

- The Committee on Trade and Environment has emerged as the key institutional element within the WTO for exploring the trade and environment nexus in a comprehensive fashion. While the Committee has not gone as far as might have been wished in certain areas, it has helped to identify a number of key trade and environment issues and advanced the understanding of WTO members on these issues.

The Uruguay Round Agreements have changed the landscape for environmental policy makers in terms of the interaction with trade rules. The precise application to environment policy of the new rules brought in by the Agreements is not always clear. This has added new dimensions to the environment policy-making process, requiring much more awareness on the part of policy-makers of international developments in fields that were traditionally considered isolated from each other, more consultations and more interdisciplinary analysis, and an increased draw on time and resources as a result. These developments may have affected the introduction of certain environmental policies and measures. However, there is no evidence that they have inhibited Canada's ability to maintain strong environmental policies and regulations.

It is important to underline that this retrospective analysis represents only the first stage of a Strategic Environmental Assessment of the new round of negotiations. It focuses specifically on evaluating the accuracy of earlier findings to help formulate the methodology for assessing the new round. Trade liberalization can affect the environment through direct or indirect scale, technology, structural and regulatory effects.[4] This retrospective analysis, and the 1994 Environmental Review, focussed on the "regulatory effects" of trade liberalization. The methodology for the SEA of the new round will adopt a broader approach to the analysis of the potential effects of trade liberalization.

The environmental assessment of trade agreements is a complex task, and answers to important questions are sometimes elusive. The task is complex because it is often difficult to isolate the impact of trade liberalization given increased international economic integration and globalization. In assessing the environmental effects of the Uruguay Round, other developments must be considered, such as increased international economic integration, the effects of regional trade agreements, and various regional and national political factors. The various linkages that should be considered while assessing the environmental effects of trade are well articulated in a recent study issued by the World Trade Organization.[5] The integrated and complex nature of potential environmental effects of liberalised trade clearly requires a more interdisciplinary analysis in assessments, and greater appreciation for the relationship between international trade rules and domestic regulations. Methodological advances for assessing the potential environmental effects of trade agreements have been made since the 1994 Environmental Review was conducted, and the Canadian assessment of the new round will benefit from these advancements.

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4 See OECD, 1994, for a discussion on the different types and levels of potential effects of trade agreements.

5 World Trade Organization, 1999a.

I. INTRODUCTION

In December 1993, the largest and most complex trade negotiation in history was successfully concluded when consensus was reached in the Uruguay Round of Multilateral Trade Negotiations (the Uruguay Round).[6] After the conclusion of the final round of negotiations, Canada conducted an environmental review of the results of the Uruguay Round. The 1994 Canadian Environmental Review of the Uruguay Round of Multilateral Trade Negotiations (1994 Environmental Review) proceeded by initially studying all the agreements concluded during the round to assess the magnitude and type of environmental effects that might result. It was determined that nine of the agreements could potentially have an environmental effect, and each was assessed in turn.

The 1994 Environmental Review concluded that the Uruguay Round would "promote the more efficient allocation and use of resources and thereby contribute to an increase in production and incomes and to a lessening of demands on the environment."[7] It was further concluded that the Uruguay Round would likely have a small and positive effect on the Canadian environment. To a large extent, this conclusion was based on the finding that the Uruguay Round would not affect Canada's right to maintain its strong environmental policies and regulations. On the eve of a new round of multilateral trade negotiations at the World Trade Organization (WTO), Canada is revisiting its 1994 Environmental Review to assess the accuracy of the findings. This retrospective analysis is intended to assist in the Canadian Strategic Environmental Assessment (SEA) of agreements to be negotiated during the new round of multilateral trade negotiations.

The SEA of the new round will be conducted in three distinct phases.[8] This retrospective analysis represents the work of the first phase. It evaluates the accuracy of the findings of the 1994 Environmental Review to help formulate the methodology for assessing the new round. The second phase will entail the formulation of that methodology once the agenda for the new round is delineated at the Seattle Ministerial in December 1999. The third phase of the SEA will involve a detailed review of environmental issues in accordance with the parameters established in the methodology, and will be undertaken concurrently with the WTO negotiations over the course of the next few years. Public participation will form an integral component of the second and third phases of the SEA. [9]

Trade liberalization can affect the environment through direct or indirect scale, technology, structural and regulatory effects.[10] It is important to emphasize that this retrospective analysis, and the 1994 Environmental Review, focussed on the "regulatory effects" of trade liberalization. The methodology for the SEA of the new round will adopt a broader approach to the analysis of the potential effects of trade liberalization.

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6 The negotiations were formally concluded at the Ministerial Meeting held in April 1994 in Marrakesh, Morocco. The Final Act embodying its results came into force on 1 January 1995.

7 Canada, 1994, p. 35.

8 For more details on the Canadian Strategic Environmental Assessment of the new round of multilateral trade negotiations at the WTO, visit the Department of Foreign Affairs and International Trade's internet site: http://www.dfait-maeci.gc.ca/tna-nac/menu-e.asp

9 Comments received on this Retrospective Analysis will be incorporated into the methodology for assessing the effects of the next round. To provide your comments, visit the internet address above.

10 See OECD, 1994, for a discussion on the different types and levels of potential effects of trade agreements.

This 1999 retrospective analysis mirrors the format adopted in the 1994 Environmental Review, with the addition of two new sections, and will examine the following:

- The Marrakesh Agreement Establishing the World Trade Organization
- The Committee on Trade and Environment
- The General Agreement on Tariffs and Trade (1994)
- The Agreement on Agriculture
- The Agreement on Sanitary and Phytosanitary Measures
- The Agreement on Technical Barriers to Trade
- The Agreement on Trade-Related Investment Measures
- The Agreement on Subsidies and Countervailing Measures
- The General Agreement on Trade in Services
- The Agreement on Trade-Related Aspects of Intellectual Property Rights
- The Understanding on Rules and Procedures Governing the Settlement of Disputes

The second and third sections - the Committee on Trade and Environment, and the General Agreement on Tariffs and Trade (1994) - were not considered in separate sections in the 1994 Environmental Review, but do warrant special attention in this retrospective because they help to establish the broader context of how the WTO has dealt with environmental issues since its inception five years ago. The remaining sections provide an analysis of the impact of the various agreements reviewed in the 1994 Environmental Review on Canada's right to protect its environment. Each section of this retrospective analysis has two parts: the first provides a description of the agreement and the findings of the 1994 Environmental Review; and the second part assesses the accuracy of the 1994 findings in light of Canada's experience over the last five years.

II. THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The Agreement Establishing the World Trade Organization brought responsibility for all of the existing GATT and new Uruguay Round agreements under one comprehensive intergovernmental organization. The preamble to the Agreement recognizes the important relationship between trade, economic and sustainable development objectives: Parties will endeavour to pursue economic growth "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

The 1994 Environmental Review concluded that the creation of the WTO would not have any environmental impact *per se*. However, this Agreement states that the WTO is required to "make appropriate arrangements for effective co-operation with other intergovernmental organizations" with related responsibilities, it was thought that this would ensure co-operation between the WTO and other international institutions involved in trade- and environment-related issues. In addition, the Agreement provides for the WTO General Council to make "appropriate arrangements" for non-governmental organization consultation and co-operation, and it was expected that this would give the WTO access to environment, business and development expertise on environment-related matters.

B. RETROSPECTIVE ANALYSIS

There are three important issues that require retrospective analysis in relation to the Agreement to Establish the WTO include:

i) Whether the emphasis on sustainable development in the preamble has had any effect;

ii) Whether "appropriate arrangements for effective co-operation with other intergovernmental organizations" have taken place; and

iii) Whether appropriate arrangements have been made to consult and co-operate with non-governmental organizations.

i) Has the sustainable development provision in the preamble had any effect?

The preamble states that Members will endeavour to achieve economic growth in accordance with the objective of sustainable development. Although this does not create any legally binding obligations, it has, however, affirmed that trade and environmental objectives must be integrated at the domestic and international levels. It is now more widely accepted that trade and environment objectives must be integrated into the international trading system.

In addition, the influence of the preamble was demonstrated by the Appellate Body in its decision in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. In that decision, the Appellate Body cited the preamble to the WTO, in addition to the Ministerial decision to establish the WTO Committee on Trade and Environment, the Rio Declaration on Environment and Development, and Agenda 21, as interpretive tools to establish the background and context for analysing the preamble to Article XX. It also used the preamble of the *Marrakesh Agreement* in its analysis of Article XX(g).

While GATT Article XX has not been modified since it was drafted in 1947, the Appellate Body's decision to interpret Article XX in light of the commitment to sustainable development stated in the preamble demonstrates one way in which, in the words of the Appellate Body, the provision has "informed" the interpretation of other provisions - that involve legal obligations - of the WTO Agreements.

ii) Have "appropriate arrangements for effective co-operation with other intergovernmental organizations" been made?

Initiatives have been taken by both the WTO and relevant international organizations to work together to promote environmentally sustainable trade. For example, the WTO Committee on Trade and Environment has granted formal observer status to the Secretariats of the following intergovernmental bodies:

- the United Nations (UN)
- the United Nations Conference on Trade and Development (UNCTAD)
- the World Bank
- the International Monetary Fund (IMF)
- the United Nations Environment Program (UNEP)
- the United Nations Development Programme (UNDP)
- the Commission for Sustainable Development (CSD)
- the Food and Agriculture Organization (FAO)
- the International Trade Centre (ITC)
- the Organization for Economic Cooperation and Development (OECD)
- the European Free Trade Association (EFTA)
- the African, Caribbean and Pacific Groups of States (ACP Group)
- the Convention on Biological Diversity (CBD)
- the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)
- the International Organization for Standardization (ISO)
- the International Plant Genetic Resources Institute (IPGRI)
- the Latin American Economic System (SELA)
- the United Nations Industrial Development Program (UNIDO)
- the World Customs Organization (WCO)
- the World Intellectual Property Organization (WIPO).

As noted in Section III, the Secretariats of relevant multilateral environmental agreements were invited to participate in the WTO Committee on Trade and Environment in order to deepen the WTO's understanding of the potential linkages between multilateral environmental and trade agendas. Representatives from numerous international organizations have actively participated in WTO Symposia on Trade and the Environment and Trade and Development. As well, the United Nations Environment Program (UNEP) and the WTO are examining various options for establishing a more formal cooperative relationship between the two organizations.

iii) Have appropriate arrangements been made with respect to non-governmental organization consultation and co-operation?

With respect to the requirement that the WTO make appropriate arrangements for effective co-operation with non-governmental organizations, since 1994, a number of developments have taken place. Most notably, the WTO General Council adopted, in 1996, Guidelines for Arrangements on Relations with Non-Governmental Organizations.[11] The Guidelines state the important role that NGOs can play in increasing public awareness of the WTO activities, and call for improved transparency and communication with NGOs. To achieve greater transparency, the Guidelines call for improved public access to WTO documents, and specifically, on-line computer access. Calling for the Secretariat to play a more active role in its direct contacts with NGOs, the Guidelines note that NGOs are a valuable resource that can contribute to the accuracy and richness of public debate. Suggested methods to increase interaction between the Secretariat and NGOs include *ad hoc* and specific symposia on WTO-related issues, informal arrangements to receive the information NGOs may wish to bring to the attention of interested delegations, to continue providing general information and briefings about the WTO and responding to specific requests. Finally, in calling for improved NGO access to the WTO, the Guidelines note the special character of the WTO, that it is both a legally binding inter-governmental treaty of rights and obligations among its Members and a forum for negotiations. Consequently, while it is not possible for NGOs to be directly involved in the work of the WTO or its meetings, constructive engagement could occur at the national level when public interest concerns are integrated into trade policy-making.

A number of initiatives have followed the adoption of these guidelines. The WTO internet site has a special section for NGOs: a list of papers submitted by the latter to the WTO is updated regularly.[12] Also available on the WTO internet site six months after the date of their circulation are all working documents, background notes by the Secretariat, and minutes of meetings of all WTO bodies. While there is this six month rule on documents, any Member submitting documents for circulation to WTO Members may indicate that the document is unrestricted and may be released immediately.

Also, NGOs have participated in a number of symposia funded and organized by the WTO. A Symposium on Trade, Environment and Sustainable Development is held annually and attended by participants representing environment, development, consumer NGOs, industry interests, academics, and Member governments. The symposia are intended to engage participants in discussions and to examine the inter-linkages between trade, environment, and sustainable development issues. A major High Level Symposium on Trade and Environment held by the Secretariat in March 1999 facilitated broad discussions between NGOs, business groups, intergovernmental groups, government officials and the Secretariat on a wide range of trade and environment issues. Canada has contributed to the funding of the WTO symposia.

Finally, NGO participation is an important contribution to WTO Ministerial Conferences: 108 NGOs attended the 1996 Singapore Ministerial Conference; and over 120 NGOs attended the Geneva Ministerial Conference in 1998. Over 700 NGOs are registered to attend the 1999 Seattle Ministerial Conference.

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11 World Trade Organization, 1996c.

12 For example, see: http://www.wto.org/wto/ngo/ngo.htm

A variety of mechanisms are in place in Canada for NGOs to contribute to the public debate on the relationship between trade and environment. For example, the Standing Committee on Foreign Affairs and International Trade met with Canadian NGOs to seek their views on priorities for the new round of multilateral trade negotiations.[13] The Department of Foreign Affairs and International Trade and Environment Canada held consultations across Canada in June 1999 seeking public input on trade and environment issues in advance of the Seattle Ministerial meeting. Additionally, as part of the Canadian Strategic Environmental Assessment of the new round, Canada will hold broad consultations.[14]

13 For example, see the SCFAIT website: http://www.parl.gc.ca/36/1/parbus/commbus/house/committeemain.asp?language=E&committeeId=64

14 For example, see: http://www.dfait-maeci.gc.ca/tna-nac/social-e.asp#environment

III. THE COMMITTEE ON TRADE AND ENVIRONMENT

A. OVERVIEW OF THE COMMITTEE AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

As anticipated in the 1994 Environmental Review, the Ministerial Council in Marrakesh directed the first meeting of the General Council of the WTO to establish a Committee on Trade and Environment (CTE). The CTE was created "to identify the relationship between trade measures and environmental measures in order to promote sustainable development", and "to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system."[15] The CTE mandate states "that there should not be, or need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment and sustainable development on the other."[16] In creating the CTE, Ministers also stated a desire "to coordinate the policies in the field of trade and environment without exceeding the competence of the multilateral trading system."[17]

B. RETROSPECTIVE ANALYSIS

There are two key elements that require retrospective analysis with respect to the establishment of the Committee on Trade and Environment:

i) The issues that the CTE has focussed on; and

ii) The effectiveness of the CTE in achieving its mandate.

i) What issues has the CTE focussed on?

The CTE is the key institutional element in the WTO for exploring the relationship between trade and environmental policy and rules. To accomplish this mandate, the CTE adopted a ten point agenda. The breadth of subject matter pursued by the Committee is significant.[18] A brief summary of the work under each item is as follows:

ITEMS 1 and 5: "The relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements (MEAs); and the relationship between the dispute settlement mechanisms in the

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15 World Trade Organization, 1996d. Annex 1.

16 Ibid.

17 Ibid.

18 For more details on the work of the CTE, see: World Trade Organization, 1999b, pp. 12 -19.

multilateral trading system and those found in MEAs."

Discussion of Items one and five, which deal with the relationship between trade rules and environmental agreements, have been a major focus of work in the CTE. Much of the discussion has focussed on developing an approach to MEAs that would assist the WTO in assessing MEA trade measures, and international environmental negotiators in contemplating the use of trade measures in MEAs. To date there has been no consensus with respect to such an approach.

ITEM 2: "The relationship between environmental policies relevant to trade and environment measures with significant trade effects and the provisions of the multilateral trading system."

CTE discussions with respect to Item two have focussed on environmental reviews of trade agreements. While many WTO Members generally endorse, or are supportive of, environmental reviews on a national basis, most WTO Members are not undertaking such reviews.

ITEM 3: "The relationship between the provisions of the multilateral trading system and: (a) charges and taxes for environmental purposes; (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling."

The focus of CTE discussions under Item three has been on eco-labelling and environmental certification with an emphasis on the need for greater transparency in developing product criteria, especially with respect to voluntary standards based on non-product related processes and production methods (i.e. eco-labelling and environmental certification). Members have also discussed the need for multilaterally agreed standards, and establishing the "equivalence" of different standards, in particular through work at the WTO Committee on Technical Barriers to Trade.

ITEM 4: "The provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects."

There has been little recent discussion of Item four which deals with the need to provide notification of trade-related environmental measures. An Environmental Database listing trade-related environment measures has been developed at the WTO and is updated regularly.

ITEM 6: "The effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions."

Item six has been addressed on a sector-by-sector basis with respect to agriculture, energy, fisheries, forestry, non-ferrous metals, textiles and clothing, leather and environmental services. A review of the relationship between the elimination of subsidies, tariffs and non-tariff barriers and the related environmental benefits in each of these sectors, and particularly in the agriculture sector, has been the main focus of discussion. However, no consensus with respect to the environmental impact of removing trade distorting measures in these sectors has been achieved.

ITEM 7: "The issue of the export of domestically prohibited goods (DPGs)."

In recent years, Item seven has generated very little discussion at the CTE. There is a general sense that DPG concerns have largely been addressed by environmental agreements that have been concluded in the past ten years.

ITEM 8: "The relevant provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPs Agreement)."

Discussion of Item eight, although limited, has focussed on the need for greater access to environmentally sound technology; and on the provision of incentives for the conservation and sustainable use of biological resources and the equitable sharing of the benefits of their use, including in relation to the knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles pursuant to the UN Convention on Biological Diversity.

ITEM 9: "The work programme envisaged in the Decision on Trade in Services and the environment."

Discussion of Item nine is aimed at determining whether any modification of the General agreement on Trade in Services (GATS) Article XIV, General Exceptions, are required in order to respond to environmental concerns. While several service sectors have been discussed, no environmental issues have been identified that would justify an amendment to the GATS Agreement.

ITEM 10: "Input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations referred to in Article V of the WTO Agreement."

Pursuant to Item ten, a number of intergovernmental organizations have been extended observer status at the CTE and the CTE Secretariat organized NGO Symposia on Trade and Environment in 1997 and 1998. A number of useful papers prepared by intergovernmental environmental bodies have assisted the work of the CTE. The need to increase WTO transparency was originally discussed under this agenda item, but in view of the importance of transparency in all aspects of the WTO's work the discussion has moved to the WTO General Council.

ii) How effective has the CTE been in achieving its mandate?

The CTE's first Report[19], submitted in December, 1996, to the WTO Ministerial Conference at Singapore, summarized the discussions in the CTE, as well as the conclusions reached, and made recommendations for future work. While environmental policy expectations were not satisfied by the conclusions in the Report, it did go further than the previous GATT reports in acknowledging the legitimacy of environmental policies at both the multilateral and domestic levels. The Singapore Ministerial Declaration, which reflected the CTE's conclusions, acknowledged the complementary nature of trade liberalization, economic development and environmental protection and underlined the importance of policy coordination at the national level in the area of trade and environment. In view of the breadth and complexity of the issues discussed by the CTE, the Ministers agreed at Singapore to continue the work of the CTE pursuant to the terms of reference set out at Marrakesh.

Since the Singapore Ministerial there continues to be no agreement in the CTE on whether changes to the multilateral trading system are required to address trade and environment concerns. However, the CTE has been a useful forum for improving trade officials' understanding of environmental issues, especially through regular information sessions with the Secretariats of multilateral environmental agreements (MEAs) and other international organizations. Unfortunately, relatively few officials from environment ministries attend CTE meetings and the failure to coordinate domestic policy formulation between domestic trade and environment ministries remains a problem, both at the WTO and in the context of MEA negotiations.

NGO symposia on trade and environment organized by the CTE in 1997 and 1998, and the WTO High-Level Symposium on Trade and Environment in March, 1999, have also increased WTO transparency by increasing public awareness of WTO activities. These symposia have also offered a valuable opportunity for the exchange of views among senior trade and environment officials, and also provided them with first-hand exposure to a range of issues and perspectives in the trade and environment debate, including the views of a good cross section of NGOs, industry associations and academics. Items one and five of the CTE's work agenda consider specifically the relationship between trade measures in multilateral environmental agreements (MEAs) and the multilateral trading system. While a substantial amount of work has gone into examining the relationship, there is no agreement as yet on whether or how best to modify WTO provisions to accommodate MEAs. Moreover, some members of the CTE hold the view that WTO provisions already provide a broad enough scope for trade measures in MEAs to be applied in a manner consistent with WTO rules. The CTE endorses the notion that multilateral solutions are the best and most effective way for governments to address global and transboundary environmental problems, and notes that the essence of the WTO is to seek multilateral solutions to trade concerns. The Secretariats of relevant multilateral environmental agreements have participated in the WTO Committee on Trade and Environment in order to deepen the WTO's understanding of the potential linkages between multilateral environmental and trade agendas. CTE work continues in this area.

While the CTE has been a useful forum for improving trade officials' understanding of environmental issues, especially through regular information sessions with the Secretariats of multilateral environmental agreements (MEAs) and NGO symposia, relatively few officials from environment ministries attend CTE meetings. The failure to coordinate domestic policy formulation between trade and environment ministries can also be problematic in the context of

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19 World Trade Organization, 1996d.

MEA negotiations that may have an impact on trade (e.g., Basel Convention and the proposed Biosafety Protocol).

IV. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1994)

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The 1994 Environmental Review did not analyse the potential environmental effects of General Agreement on Tariff and Trade (GATT 1994). The rationale for not considering the GATT 1994 was that it was virtually identical to its predecessor, GATT 1947, that had been in place for almost fifty years. The GATT 1994 consists of the original text of the GATT as modified over the years, plus the tariff concessions, protocols of accession, waivers, and the Decisions made by the parties of the original GATT, and a number of Understandings. One provision of the GATT 1994, that was also in the GATT 1947, has recently commanded considerable attention from an environmental perspective, namely, Article XX.

GATT Article XX sets out limited and conditional exceptions for measures that are otherwise inconsistent with international trade obligations. The general exceptions allow WTO Members to adopt or enforce measures for various objectives, subject to the condition that these must not constitute disguised restrictions on international trade or unjustifiable discrimination between countries where the same conditions prevail.[20] These include two sets of circumstances for environmental reasons: (1) measures necessary to protect human, animal or plant life or health, and (2) measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[21] Article XX(d), may also afford some scope for justifying otherwise inconsistent measures although it has not yet been tested in a dispute involving an environmental context.

It is important to note that there have been relatively few environmentally-related disputes, even since the inception of the WTO (with a binding dispute settlement mechanism in an era of more aggressive environmental policy making) on January 1, 1995. This is particularly noteworthy given the number of disputes that have been brought before the WTO in its short five-year existence (so far, 181 requests for consultations, 140 distinct matters, 30 active cases, 24 completed cases, and 37 settled or inactive cases), compared to the total number of disputes that were brought to the GATT through its 47-year history (just 101 cases that resulted in adopted panel reports).

It is also significant that Article XX only comes into play as a defence for an environmental

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20 Article XX(b), (d) and (g) allow WTO Members to justify measures that are otherwise inconsistent with the GATT, if those measures are:

(b) necessary to protect human, animal, or plant life or health;

...

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement...;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with domestic restrictions on production or consumption;

...

Even if a measure meets the requirements of one or more of the above, it must also meet the requirements set out in the preamble of Article XX. The preamble requires that the measure in question must be " applied in a manner which would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

21 World Trade Organization, 1998b, p. 1.

measure if that measure is otherwise inconsistent with GATT obligations, in particular, Most Favoured Nation (Article I), National Treatment (Article III) and quantitative restrictions that are inconsistent with Article XI. Within the scope of these three obligations, there is already considerable scope for governments to institute regulatory measures aimed at domestic environmental protection policy concerns.

B. RETROSPECTIVE ANALYSIS

An important issue to address in this retrospective is the outcome of environment-related WTO disputes where Parties have invoked GATT Article XX exceptions.

i) What has been the outcome of environment-related WTO disputes where Parties have invoked GATT Article XX exceptions?

Since the inception of the WTO on January 1, 1995, out of a total of 24 completed cases, there have been two disputes of an environmental nature involving GATT Article XX: *United States - Standards for Reformulated and Conventional Gasoline*;[22] and *United States - Import Prohibition of Certain Shrimp and Shrimp Products*.[23] The reasoning of panels and the Appellate Body in deciding disputes is at least as important, and likely more important, than the outcomes of the two environmentally-related Article XX rulings. These cases are relevant because they have clarified, to some extent, the degree to which the GATT may constrain WTO Members when trade rules and measures to implement environmental policy objectives intersect. Some commentators have argued that these cases limit the right of countries to enact environmental protection legislation. In fact, they illustrate the important role that a rules-based dispute settlement mechanism plays in maintaining a fair balance between the rights and obligations of WTO Members in the use of trade measures for environmental purposes. The decisions do not question the right of each WTO member to establish and implement environmental policies that are appropriate for its domestic context. They require only that the measures applied in pursuit of those policies must be consistent with the obligations assumed under the WTO Agreement.

In the *Reformulated Gasoline* case, a federal regulation in the United States, the "Gasoline Rule", was challenged on the basis that, among other things, it was inconsistent with GATT Article III:4. Article III:4 requires that imported products must not be treated less favourably than domestically-produced "like" products.[24] The Gasoline rule permitted domestic gasoline refiners to apply individually-determined baselines for measuring gasoline cleanliness. In contrast, imported gasoline had to measure cleanliness against a statutorily-determined baseline. The dispute settlement Panel agreed with the view of the complainants (Venezuela

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22 " United States- Standards for Reformulated and Conventional gasoline - Report of the Panel" ; WT/DS2/R, as modified by the " United States- Standards for Reformulated and Conventional gasoline - Report of the Appellate Body" ; WT/DS2/AB/R, both adopted on May 20, 1996 [Reformulated Gasoline case].

23 " United States - Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Panel" ; WT/DS58/R, as modified by " United States - Import Prohibition of Certain Shrimp and Shrimp Products - Report of the Appellate Body" ; WT/DS58/AB/R, both adopted on November 6, 1998.

24 To obtain the full text of the cases, visit the WTO Internet site at: http://www.wto.org/wto/ddf/ep/public.html and search for document numbers as listed in footnotes 14 and 15 (e.g. WT/DS2/R).

and Brazil) that the regulation treated imported gasoline less favourably than domestic gasoline, and that the two were "like" products for the purposes of Article III.

In defence of the regulation, the United States argued that it was nevertheless justified under the exceptions found in Article XX(b), (d) and/or (g). Neither the Panel, nor the Appellate Body, which heard the U.S. appeal of the Panel Report, came to the conclusion that the regulation could be justified under Article XX, but they arrived at that conclusion via different routes.

In an important development that extended the availability of Article XX to justify otherwise GATT-inconsistent environmental measures, the Appellate Body overruled the Panel's reasoning with regard to the proper scope of Article XX(g). In analyzing that provision, the Appellate Body came to the conclusion that there must be a "substantial relationship" between the challenged measure and the conservation of an exhaustible natural resource. In addition, the Appellate Body found that there is a requirement of even-handedness in imposing restrictions on imported products and imposing corresponding restrictions on domestic production or consumption. On the basis of this reasoning, the Appellate Body found that there was a substantial relationship between the Gasoline Rule and the conservation of clean air, and that the measure affected both domestic and imported gasoline.

Having concluded that the Gasoline Rule met the requirements of Article XX(g), the Appellate Body considered whether the measure met the requirements of Article XX's preamble. The preamble requires that the measure in question must be "applied in a manner which would not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

According to the Appellate Body, the regulation did not meet the requirements of the preamble of Article XX. It came to this conclusion for the following reasons:

- It agreed with the findings of the Panel that the "anticipated difficulties concerning verification and enforcement" were not sufficient to justify denying foreign refiners access to the individual baseline approach permitted to domestic refiners.[25]

- There was no indication in the evidence that the U.S. had made an effort to establish agreements with the complainant WTO Members that would have enabled the U.S. Environmental Protection Agency to verify and enforce the accuracy of individual baseline standards for imported gasoline, even though such arrangements are common in other spheres of international trade.[26]

- Although the U.S. gave considerable thought to the physical and financial costs and burdens of imposing a statutory baseline on its domestic refiners, there was nothing in the evidence to suggest that it gave the same consideration to foreign refiners.[27]

In the view of the Appellate Body, these factors led it to conclude that the U.S. had

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25 World Trade Organization, 1996b, p. 34.

26 Ibid.

27 Ibid., p. 35.

discriminated against foreign gasoline in a manner that was neither inadvertent nor unavoidable. This constituted "unjustifiable discrimination" and a "disguised restriction on international trade."

It is important to note that neither the Panel nor the Appellate Body questioned the importance or necessity of the environmental objectives of the "Gasoline Rule", or the Clean Air Act (the legislation under which the rule was promulgated). Rather, they focussed on those aspects of the regulation that were raised by the complainants under specific provisions of the GATT. The Appellate Body noted, at the conclusion of its decision, that, "WTO Members have a large measure of autonomy to determine their own policies on the environment (...), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the [GATT] and the other covered agreements."[28]

The second dispute relevant to this retrospective analysis that was argued on the basis of Article XX is *the United States - Import Prohibition of Certain Shrimp and Shrimp Products*.[29] This case also involved a dispute over U.S. legislation, intended to protect endangered or threatened sea turtles. The legislation prohibited the importation of shrimp from countries that did not have in place turtle conservation measures (among other things, a technology known as a Turtle Excluder Device (TED)) comparable to those imposed on U.S. shrimpers.

India, Malaysia, Pakistan and Thailand complained that the U.S. prohibition, among other things, violated Article XI of the GATT, which prohibits WTO Members from imposing quantitative restrictions on imported goods, such as shrimp. The Panel agreed, and further found that it could not be justified under GATT Article XX.

On appeal, the Appellate Body disagreed with much of the reasoning of the Panel but came to the same final conclusion. The Appellate Body found that the measure qualified for provisional justification under Article XX(g) as a measure related to the conservation of exhaustible natural resources that was being made effective in conjunction with domestic restrictions on production. However, the Appellate Body ultimately concluded that the measure failed to meet the requirements of the preamble of Article XX because it was applied in a manner that unjustifiably and arbitrarily discriminated against some WTO Members.

In its reasoning, the Appellate Body made a number of important statements that are likely to be helpful to countries in developing and implementing environmental measures that can be expected to have trade effects:

- It noted that the scope of the subject-matters covered by the specific exception found in Article XX(g) – that is, the definition of "exhaustible natural resources" – is capable of evolving over time.[30]

- It noted its finding in the Reformulated Gasoline case that it is sufficient that there be a substantial relationship between the challenged measure and the policy objective of

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28 Ibid., p. 37.

29 To obtain the full text of the cases, visit the WTO internet site at: http://www.wto.org/wto/ddf/ep/public.html and search for document numbers as listed in footnotes 14 and 15 (e.g. WT/DS2/R).

30 World Trade Organization, 1998d, para. 130.

conservation in order to find that the measure is "related to" that objective.[31]

- In noting the clause in Article XX(g) that the conservation measure must be "made effective in conjunction with restrictions on domestic production or consumption", the Appellate Body recalled its finding in the Reformulated Gasoline case that this required an even-handed approach in the imposition of restrictions on the production or consumption of imported and domestic exhaustible natural resources.[32]

- In its analysis of the U.S. measure in relation to the preamble of Article XX, the Appellate Body made the following findings[33]:

  - The measure, as applied, was, in effect, an economic embargo that required all other WTO Members wishing to export shrimp to the United States to adopt essentially the same policy as that applied to and enforced against U.S. shrimp trawlers, without scope for any flexibility as to how the policy objective was to be achieved, and without taking into consideration different conditions which may exist in the territories of those Members.

  - The U.S. did not put forward any evidence that it had sought to negotiate bilateral or multilateral agreements with the complainant WTO Members prior to enforcing the import prohibition, even though it had concluded a comparable regional agreement in the same subject matter with other WTO Members.

  - The phase-in periods in the U.S. regulatory regime differed in that some WTO Members were given three years to adopt conservation programs, while the complainant WTO Members were only given four months.

  - The U.S. differentiated between WTO Members in its efforts to ensure that the TED technology was made available to countries wishing to export shrimp to the United States, with little effort devoted to ensuring its successful transfer to the complainant WTO Members.

  - From a procedural standpoint, the regulatory regime did not provide an opportunity for a country applying for certification (that its conservation program met the requirements of the U.S. policy) to be heard, to respond to arguments made against its application, or to be formally informed of the decision (and/or the reasons for that decision) regarding its application.

For these reasons, the Appellate body found that the measure was being applied against the complainant WTO Members in a manner that unjustifiably and arbitrarily discriminated against them.

Of relevance to the relationship between the WTO and MEAs, the Appellate Body in its decision in the Shrimp Turtle case noted the following remarks from the WTO Members in the

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31 Ibid., para. 136. This term was further defined as " a close and genuine relationship of ends and means" .

32 Ibid., para. 143.

33 Ibid., para. 161, 166-72, 173-74, 175, 180-83.

Report of the CTE, forming part of the Report of the General Council to Ministers on the occasion of the Singapore Ministerial Conference:

> Multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO agreements and multilateral environmental agreements (MEAS) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both.[34]

The reasoning of the Appellate Body in these two cases suggest that, in principle, Article XX provides considerable scope for justifying environmental measures with trade effects, even where those measures are otherwise inconsistent with WTO obligations. The decisions do not question the right of WTO members to establish and implement environmental protection measures, but do underscore that such measures must be consistent with the obligations assumed under WTO agreements.

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34 Ibid., para. 168.

V. THE AGREEMENT ON AGRICULTURE

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The 1994 Environmental Review highlighted the importance to the Canadian agri-food sector of exports and noted that clear rules for the international trade of agricultural products were established through the Uruguay Round. The Agreement on Agriculture has three key sets of provisions:

- Improved market access through conversion of non-tariff barriers to tariffs, and gradual tariff reductions.

- Increased export competition through gradual reductions in export subsidies and in certain domestic support programs that are production and trade-distorting and that do not limit production.

- Domestic support provisions to exempt subsidies with no, or minimal, effects on trade from reduction commitments or from the threat of countervail. These "green box" programs include funding for environmental initiatives, direct payments to producers and government participation in income insurance and safety net programs that meet the prescribed criteria.

The 1994 Environmental Review noted that Canada had already met, before the conclusion of the Uruguay Round, its commitments to cut domestic support payments under the type of programs specified in the Agreement. It was therefore expected that the Agreement would have no environmental policy implications for Canada in this regard during the implementation period (1995-2000). In the longer term, however, the Agreement's emphasis on reduced government protection and support was expected to encourage less intensive forms of agriculture, involving reduced input use of pesticides and fertilizers, and more appropriate use of agricultural lands, and improvements in the environment.

It was further noted in the 1994 Environmental Review that the Agreement had potentially positive policy implications in terms of the funding of environmental programs, as such programs are explicitly provided for under the "green box" provisions that exempt programs from reduction commitments. For example, increased diversification of agriculture in the Prairies was seen as an example of an environmental policy objective that would be supported by a shift to more commodity-neutral farm support programs, and by increased funding for environmental programs. If the Agreement were to provide an impetus for reform in this direction, the potential environmental impact would be positive. Overall, the implications of the Uruguay Round for environmental policy in the agricultural and agri-food sector were expected to be positive and small.

B. RETROSPECTIVE ANALYSIS

From an environmental point of view, there are two important issues requiring a retrospective analysis with respect to the Agreement on Agriculture:

i) Whether the Agreement on Agriculture has been a contributing factor to a transformation in the nature of agricultural production to a form that is less disruptive to

the environment; and

ii) Whether the Agreement on Agriculture has affected environmental policy in the agriculture and agri-food sector.

i) Has the Agreement on Agriculture contributed to a transformation in the nature of agricultural production to a form that is less disruptive to the environment?

Before the conclusion of the Uruguay Round of negotiations, Canada had been carrying out major agricultural policy reform. Federal and provincial governments were moving away from interventions affecting production and markets and focussed more on encouraging market orientation and competitiveness. The conclusion of the Uruguay Round occurred while this domestic policy reform was well underway.

In 1995, the subsidies for the export of grains and oilseeds from Western Canada were eliminated. This specific reform, in conjunction with adjustment and adaptation programs, has helped to diversify crop production from traditional grains and oilseeds to other crops. Furthermore, "value-added" production (e.g. livestock production, grain milling) increased in Western Canada.

Environmental assessments of the elimination of the export subsidies indicated that it would have a small, positive net impact on the physical environment of the prairies. However, the effects due to the change in production and transportation patterns depend on the specific environmental factor being considered. Specifically, total erosion levels would be reduced due to shifts of marginal land out of annual crops, and wildlife value on this land would improve. Increased emissions of greenhouse gases from trucking would be more than offset by decreases in transportation due to a lower volume of bulk exports resulting from more value-added processing near the site of production. Any increase in summer-fallow attributable to the reform is likely to be countered by the long-term trend towards continuous cropping.

Besides the reduction in level of support to agriculture in Canada that has taken place, the nature of support has also changed. Price support programs were phased out and whole farm income safety net programs like the Net Income Stabilization Account were introduced. Adaptation and adjustment programs were also implemented. Support then shifted toward programs that provide less incentives to increase production and use intensive production practices like applying excessive amounts of fertilizers and pesticides and neglecting prudent land stewardship strategies. The Agricultural Income Disaster Assistance (AIDA) Program, created in 1998, is also a whole-farm program, designed to meet the criteria of Annex 2 (the Green Box).

Trade in agriculture and agri-food products that is allowed to respond to market signals instead of distorting support programs is intrinsically more environmentally friendly. The Uruguay Round Agreement on Agriculture began a process of reducing trade-distorting support and protection and provides a framework under which further reductions can be achieved. Since there was significant policy reform occurring already in Canada, the actual impact of the Agreement on Agriculture has likely been small. Trade-distorting support is still being provided to a great extent in many other countries, and the next round of negotiations should result in continued reductions of such support.

ii) Has the Agreement on Agriculture affected environmental policy in the agriculture and agri-food sector?

As anticipated in the 1994 Environmental Review, exempting environmental programs from reduction commitments if they meet the Annex 2 criteria of the Agreement on Agriculture has been inconsequential for Canada. Canada's level of domestic support subject to reduction commitments has remained well below the commitment level. Canada has therefore not been forced by these reduction commitments to design environmental programs or any other agricultural support program such that they meet the Annex 2 criteria. However, Canada does consider the criteria in order to design programs that are as trade neutral as possible.

Since 1995, several environmental programs have been introduced. The National Soil and Water Conservation Program, announced in June 1997, received $10 million to be directed through adaptation councils, processors and producer groups in 1997/98 and 1998/99 for the protection and enhancement of soil and water resources used in agriculture. The Hog Environmental Management Strategy was launched in 1997 by Agriculture and Agri-Food Canada and the Canadian Pork Council in order to find effective and affordable solutions to the environmental issues related to hog production. The federal government dedicated $1 million for this strategy to be matched by industry funds to conduct research and to develop new technologies with funding provided through the Canadian Adaptation and Rural Development (CARD) program. The funding and coverage of wildlife compensation programs in Saskatchewan was extended as of April 1998. The federal and provincial governments made a one-time contribution to this program of $27.8 million. Provincial governments have also implemented their own environmental programs.

VI. THE AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), negotiated for the first time during the Uruguay Round, defines the rights and obligations of members with respect to the development and application of sanitary and phytosanitary measures. These cover measures taken to protect human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food; to protect human life from plant or animal-carried diseases; to protect animal (including fish and wild fauna) or plant (including forests and wild flora) life from pests, diseases, or disease-causing organisms; to prevent or limit other damage from the entry, establishment or spread of pests.

The 1994 Environmental Review noted that under the SPS Agreement, WTO Members retain their sovereign right to determine their appropriate levels of protection against sanitary and phytosanitary risks, but that the measures adopted to achieve those levels of protection must be science-based, no more trade restrictive than required, and not result in unfair discrimination or disguised restriction on trade. It was recognized that some Canadians had voiced concern that the Agreement would affect Canada's right to choose the levels of sanitary and phytosanitary protection, and the SPS provisions were examined in some detail. The following conclusions were drawn:

- Regarding levels of protection, it was determined that Canada would maintain the right to determine the most appropriate levels of protection while ensuring that unjustifiable restrictions were not placed on Canadian agri-food, fish and forest product exports.

- Regarding scientific principles, it was noted that Canada had long relied on scientific considerations when developing sanitary and phytosanitary regulations, and that the obligation to base domestic SPS measures on scientific principles would not affect Canada's right to achieve the desired levels of protection.

- On the issue of international standards, it was observed that while some are less stringent than Canadian standards, others are more so. It was pointed out that the Agreement would not affect Canada's right to adopt and implement domestic standards that are more stringent than international guidelines, nor would it require a modification to the public notification and consultation obligations that are an integral part of regulatory policy-making in Canada.

- Regarding the requirement that SPS measures be based on an assessment of risk, this was seen as entirely consistent with Canadian practice.

B. RETROSPECTIVE ANALYSIS

From an environmental point of view, there are at least two important issues that require retrospective analysis with respect to the SPS Agreement:

i) Whether Canada has maintained the right to adopt and apply measures deemed necessary to protect the environment; and

ii) Whether emerging WTO dispute settlement decisions with respect to SPS measures have supported the right of WTO Members to apply measures deemed necessary to protect the environment.

i) Has Canada maintained the right to adopt and apply measures deemed necessary to protect the environment?

Annex 1 lists selected Canadian federal laws that are covered by disciplines contained in the Agreement on the Application of Sanitary and Phytosanitary Measures. To date, no Canadian measure has been challenged under the WTO.

The SPS Agreement has changed the landscape for environmental policy makers in terms of the interaction with trade rules. It has added new dimensions to the environment policy-making process, requiring much more awareness on the part of policy-makers of international developments in fields that were traditionally considered isolated from each other, more consultations and more interdisciplinary analysis, and there has been an increased draw on time and resources as a result. However, decision-makers and government officials are taking SPS provisions into account to avoid conflict in domestic law and regulation and WTO obligations.
This has not proved to be an excessively onerous exercise, and policies and regulations are not compromised in the process.

In fact, the SPS Agreement often works to support Canadian actions undertaken to protect the Canadian environment. A good example of this was Canada's implementation of measures over the last year to control the possible entry of the Asian long horned beetle (ALHB) to Canadian forests. Reacting to a potentially devastating establishment of ALHB, Canada was able to quickly and efficiently address the pending environmental risks with measures consistent with the SPS Agreement.

ii) Have emerging WTO dispute settlement decisons with respect to SPS measures supported the right of WTO Members to apply measures deemed necessary to protect the environment?

There have been four WTO rulings involving the application of the Agreement on Sanitary and Phytosanitary Measures. Two disputes dealt with measures allegedly taken to protect human health from contaminants (the disputes between Canada, the U.S. and the EU over the use of growth promoting hormones in cattle), one involved measures allegedly taken to protect fish health (the dispute between Canada and Australia on salmon) and finally the most recent one involved measures taken by Japan allegedly to test the efficacy of quarantine treatment for each variety of eight agricultural products (e.g. apples, cherries, peaches) that are potential hosts of codling moth, a pest of quarantine significance to Japan (the so-called varietal testing dispute between the U.S. and Japan).

There is no evidence that the Appellate's Body's ruling in these three cases have weakened the sovereign right of WTO Members to enact strong regulatory measures deemed necessary to protect human, animal or plant life or health. Indeed this right has been confirmed.

However, there is a need for WTO Members to ensure that their SPS measures are based on an assessment of the risks to human, animal or plant life or health.

For example, in the WTO dispute involving Canada and Australia over the Australian prohibition on fresh, chilled and frozen salmon for alleged fish health reasons, the WTO rulings concluded that Australia had not carried out a proper risk assessment to support its prohibition. In this particular case, it was never argued that WTO Members could not protect themselves from the entry and establishment of fish diseases, however, the WTO rulings confirmed that WTO Members had to be consistent in the application of their acceptable levels of protection and could not, as did Australia, prohibit salmon for human consumption from Canada while at the same time allow the importation of products such as bait fish and live ornamental fish which presented an even higher risk of introduction of the same diseases.

A central issue for many is how the SPS Agreement relates to countries' ability to take a precautionary approach in dealing with scientific uncertainty regarding risks. Article 5.7 of the SPS Agreement speaks to this. To date, the right to take precautionary measures pursuant to Article 5.7 has been asserted in only one dispute, that between the United States and Japan on varietal testing." The WTO ruling confirmed that while WTO Members may provisionally adopt SPS measures in respect of situations where relevant scientific information is insufficient, WTO Members have an obligation to seek to obtain additional information necessary for a more objective assessment of the risk and review the measure within a reasonable period of time. In this case, Japan was found to be in breach of its obligations as it had retain a provisional measure for some 30 years.

VII. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The 1994 Environmental Review outlined in considerable detail the nature of the Agreement on Technical Barriers to Trade (TBT) in relation to its predecessor, the 1979 Tokyo Round Agreement. The Agreement defines more explicitly than its predecessor the rights and obligations of Members regarding the development or application of product technical requirements that affect trade and the procedures to assess compliance with these requirements. The Agreement allows parties to adopt measures that might otherwise be inconsistent with WTO obligations in order to meet, among other things, environmental objectives.

These measures, which play a very prominent role in the pursuit of environmental objectives, include mandatory technical regulations, voluntary standards, and conformity assessment procedures that determine whether a product meets the requirements of a particular regulation or standard. The main environment-related elements of the TBT Agreement as highlighted in the 1994 Environmental Review are as follows:

- an explicit recognition of the right of each country to determine its own level of environmental protection;
- an explicit recognition that environmental protection is a legitimate objective of standards- related measures;
- an explicit obligation that technical regulations not be more trade-restrictive than necessary to achieve their legitimate objective;
- a requirement that there be a relationship between the extent to which a measure restricts trade and the degree of risk that the measure is intending to address;
- a presumption that technical regulations are in accordance with international guidelines and do not create unnecessary obstacles to trade;
- an obligation that importing countries consider adopting equivalent foreign technical regulations and conformity assessment procedures that would provide them with the same level of protection as their own regulation or procedures;
- extension of the mandatory notification of technical regulations to provincial and state governments;
- encouragement of agreements between member countries for mutual recognition of the results of conformity-assessment procedures carried out in other countries;
- inclusion, in the definition of technical regulations, of processes and production methods that are related to product characteristics;
- inclusion, in the definition of standards, of processes and production methods related to products; and

- a code of practice for the preparation, adoption and application of voluntary standards by government and non-governmental standardizing bodies.

The 1994 Environmental Review examined the main environment-related elements of the new TBT Agreement, and assessed the potential environmental impact of these on Canada. The following conclusions were drawn:

- On the first three points, namely, levels of protection, legitimate objectives, and trade-restrictiveness, it was concluded that Canada would retain the explicit right to continue selecting the most appropriate levels of environmental protection to reflect Canadian conditions, values and priorities.

- Regarding the requirement that there be a relationship between measures restricting trade and the degree of risk that the measure is intending to address, it was observed that contrary to what some Canadians think, scientific justification is not required to introduce such measures. It was noted, however, that technical regulations do need to consider the degree of risk to the environment that might be incurred if the measure's objectives are not met.

- On the issue of international harmonization of standards-related measures, it was stated that while the TBT Agreement encourages the adoption of such standards as much as possible where appropriate, the use of international standards is not a requirement, nor are they to be treated as a ceiling. It was made clear that Canada can continue to adopt and implement more stringent domestic measures when necessary to achieve the levels of protection that Canadians deem appropriate.

- Regarding the obligation that importing countries consider adopting equivalent foreign technical regulations and conformity assessment procedures that would provide them with the same level of protection as their own regulation or procedures, the 1994 Environmental Review noted that the importing country must agree that its legitimate objectives would be fulfilled adopting the standards-related measures of the exporting country.

- Concerning the technical regulations of provincial and state governments, it was mentioned that the notification and transparency requirement, which is similar to Canada's federal regulatory policy, will allow Canadians to obtain an accurate overview of the regulatory frameworks of sub-national jurisdictions in other countries.

- With respect to mutual recognition of the results of conformity-assessment procedures carried out in other countries, it was remarked that such agreements are entered into voluntarily, and depend on a high level of confidence between participating parties. The 1994 Environmental Review encouraged this approach, and noted that mutual recognition is useful in the environmental sector. It was also noted that Canada was at the forefront of efforts to establish criteria for an international standard for Environmental Management System (EMS). Canadian efforts subsequently formed the basis of the standard adopted by the International Organisation for Standardisation (ISO 14000).

- Regarding the issue of processes and production methods (PPMs), the 1994

Environmental Review distinguished between PPMs related to mandatory technical regulations and PPMs associated with voluntary standards. It was observed that some PPMs affect the physical or chemical-properties of goods (e.g. chlorine-free paper), others do not (e.g. air or water emission properties released by a manufacturing plant). It was noted that the TBT Agreement explicitly allows importing countries to subject imported goods to PPM-based technical regulations when they deal with product characteristics. Otherwise, importing countries are not permitted to impose PPM-based regulations on other countries.

In the case of PPMs associated with voluntary standards, imported products may be required to meet PPM-based specifications on more than the product characteristics, such as the byproducts arising from the manufacture of a product. This was seen to be entirely consistent with the voluntary nature of standards, and it was noted that although voluntary standards do not oblige exporting countries to change their environmental priorities, regulations, or standards, they do allow consumers in the importing country to choose products on the basis of the particular processes or production methods that were used. Canada's eco-labelling program, the Environmental Choice Program™, was cited as an example of a PPM-based voluntary standard for both domestic and foreign products.

- Finally, on the issue of codes of practice for the preparation, adoption and application of voluntary standards by government and non-governmental standardizing bodies, it was clarified that under the TBT text, voluntary standards are generally subject to the same rights and obligations as mandatory technical regulations, such as pre-notification requirements, non-discrimination, and unnecessary obstacles.

B. RETROSPECTIVE ANALYSIS

From an environmental point of view, there are at least two important issues that require retrospective analysis with respect to the TBT Agreement:

i) Whether Canada has maintained the right to adopt and apply measures necessary to protect the environment; and

ii) Whether the disciplines contained in the Technical Barriers to Trade Agreement on TBT have affected Canada's eco-labelling programs.

i) Has Canada maintained the right to adopt and apply measures necessary to protect the environment?

It is noteworthy that while the TBT Agreement has been invoked frequently in WTO challenges, no Dispute Settlement decisions have yet been rendered on it because Parties have not argued their disputes on the basis of TBT rules. To date, no Canadian environmental law or measure (federal, provincial/territorial or local), has been challenged under the Agreement on Technical Barriers to Trade.

Annex 2 lists selected Canadian federal laws that are covered by the Agreement on Technical Barriers to Trade's disciplines on regulations. The TBT Agreement has changed the landscape for environmental policy makers in terms of the interaction with trade rules. This

has added new dimensions to the environment policy-making process, requiring much more awareness on the part of policy-makers of international developments in fields that were traditionally considered isolated from each other, more consultations and more interdisciplinary analysis, and there has been an increased draw on time and resources as a result. However, decision-makers and government officials are taking TBT provisions into account to avoid conflict in domestic law and regulation and WTO obligations. This has not proved to be an excessively onerous exercise, and policies and regulations are not compromised in the process.

The wide variety of TBT-related measures that have been maintained or enacted in Canada since the Uruguay Round may constitute evidence that Canada has maintained its right to adopt and apply strong environmental regulations.

ii) Have TBT Disciplines Affected Eco-Labelling Programs in Canada?

The use of eco-labels by governments, industry and non-governmental organisations is increasing. In Canada, the two main types of eco-labels in operation are Type III "report card" labels, such as the Environmental Profile Data Sheet , and Type I single mark eco-labels, which include programs such as Environmental Choice. In fact, Canada was one of the first countries to notify the WTO of a voluntary eco-labelling scheme. Canadian industry has shifted its focus from, the validity of the use of life-cycle analysis, to ensuring that such programs are transparent, non-discriminatory and reflect differences in environmental absorptive capacities and policy requirements. There has been particular emphasis on equivalency concerns. Canada's Environmental Choice Program™ is a leader in promoting environmental cooperation among eco-labelling programs, and awareness by these programs of the trade dimension.

Canada's understanding of the relationship between eco-labelling programs and the TBT Agreement is four-fold. First eco-labelling programs, whether voluntary or mandatory, fall under the scope of the Agreement on Technical Barriers to Trade and the Code of Good Practice therein. Second, in the case of voluntary eco-labelling programs, the coverage of the Agreement on Technical Barriers to Trade with respect to non-product related process and production methods is unclear, given the ambiguity of the definition of "standards". Third, the emergence of international standards based on life-cycle assessment might create the basis for the *rebuttable presumption*, should a panel hear a dispute of this nature, that any such standard did not create an unnecessary barrier to international trade. Fourth, given that current international standards for eco-labelling are management standards relating to compliance with domestic policy requirements, the issue would most likely be whether the eco-labelling program was discriminatory in failing to afford equivalency. Canada has proposed that WTO Members consider clarifying and strengthening the rules governing eco-labelling programs and other voluntary standards.

VIII. THE AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The Agreement on Trade-Related Investment Measures (TRIMs) is a codification of GATT jurisprudence and, as noted in the 1994 Environmental Review, the TRIMs made GATT coverage of these measures more explicit without initiating a broad framework of rules on foreign investment. An investment measure specifies terms and conditions for the establishment, operation and disposal of investments. Trade-related measures are measures that affect trade.[35] The TRIMs Agreement prohibits trade-related investment measures that restrict and distort trade and confirms obligations in the GATT that require national treatment (treating imports no less favourably than domestic products) and that prohibit quantitative restrictions.

The 1994 Environmental Review indicated that the Agreement on TRIMs was not expected to the have environmental implications beyond those of the GATT, noting that the GATT general exceptions (Article XX) covering measures necessary to protect human, animal or plant life or health and/or related to the conservation of exhaustible natural resources apply to the TRIMs Agreement. The 1994 Environmental Review recognized that the linkages between trade and investment and trade and the environment require further analysis. It was expected that in addition to work in these areas already under way within the Organization for Economic Co-operation and Development (OECD) and United Nations Conference on Trade and Development, the WTO would carry out work on issues relating to trade, investment and the environment.

B. RETROSPECTIVE ANALYSIS

From an environmental point of view, an important issue that requires a retrospective analysis with respect to the TRIMs Agreement is whether the Trade-Related Investment Measures Agreement has had any direct environmental regulatory effects in Canada.

i) Has the TRIMS Agreement had any direct environmental regulatory effects in Canada?

Trade liberalization can affect the environment through direct or indirect scale, technology, structural and regulatory effects. The same effects can result from increased or decreased levels of foreign direct investment.

While there have been TRIMs-related disputes brought before the WTO (e.g. Canada – Autos; Indonesia – Autos), these disputes have not related to environmental issues or concerns. The TRIMs Agreement has not had a negative effect on Canada's right to enact or maintain environmental laws or regulations. As is the case with the application of the SPS Agreement,

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35 Examples of trade-related investment measures include: requirements placed on firms to purchase or use products of domestic origin or from any domestic source and to balance the purchase of imported products with the amounts related to the volume or value of local products exported; or to restrict access to foreign exchange to amount related to foreign exchange inflows attributable to the firm and the export of products, whether specified by product, volume or value or in terms of local production.

decision-makers and government officials take the TRIMs Agreement into account when drafting regulations and policies in Canada. This avoids conflict in domestic law and regulation and WTO commitments. Integrating TRIMs Agreement considerations in the exercise has not proved to be difficult, and policy and regulations have not been compromised in the process.

IX. THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The Uruguay Round negotiations resulted in several substantial changes to the Agreement on Subsidies and Countervailing Measures. The most important from an environmental perspective, was the creation of a non-actionable category of subsidies. These so-called 'green light' subsidies include certain assistance to promote adaptation of existing facilities to new environmental requirements. Subsidies that meet these requirements are exempt from the countervail and serious prejudice rules. Nonetheless, where non-actionable subsidies are believed to cause serious adverse effects to a Member's domestic industry, provisions exist for resolving such concerns.

As discussed in the 1994 Environmental Review, it was thought that an enhanced level of discipline on all subsidies could result in a more efficient allocation of resources and, therefore, less waste. In addition, the rules on dispute-settlement procedures were strengthened and streamlined to provide greater certainty in the application of new disciplines. As such, it was expected that the Subsidies Agreement, together with the improved dispute-settlement rules, could have a positive environmental impact.

B. RETROSPECTIVE ANALYSIS

From an environmental point of view, an important issue that requires retrospective analysis with respect to the Subsidies Agreement is whether the "carve-outs," or exemptions from countervail and serious prejudice rules, covering government financial assistance for adapting existing facilities to meet new environmental regulations, and "green box" exceptions generally, have allowed Canada to fund environmental initiatives.

i) Have the "carve-outs" covering government financial assistance for adapting existing facilities to meet new environmental regulations, and "green box" exceptions generally, allowed Canada to fund environmental initiatives?

To date, no WTO Member has notified that it maintained programs pursuant to the environmental "green light" provisions in the Subsidies and Countervailing Measures Agreement. There are a number of possible explanations for this. One is the fact that the procedures for notifying such programs were not finalized until the Fall of 1998. Another is that there is no obligation for a Member to notify a subsidy to the Committee under the green light provisions in order to claim green light status in the context of a dispute. Therefore, countries may find it preferable to argue a green light case only when a subsidy is challenged. More generally, countries have little experience with this process. So overall, it is difficult to assess the extent to which the "carve-out," or exemptions from countervail and serious prejudice rules, has affected government assistance to meet new environmental regulations.

To date, there have been no cases challenging a WTO Member's funding of environmentally-friendly technology initiatives, related to the environmental "carve-out." With respect to Canadian measures, no Canadian environmental programs have been challenged by our trading partners under the provisions of the Agreement.

X. THE GENERAL AGREEMENT ON TRADE IN SERVICES

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The General Agreement on Trade in Services (GATS) is the first comprehensive multilateral agreement governing trade in services. It provides a framework of general obligations and sets out some additional provisions in annexes covering regulated service sectors, such as telecommunications and financial services.

The 1994 Environmental Review observed that while some internationally traded services, such as transportation, construction and consulting, have the potential to affect the environment, the GATS contains a number of broad provisions to protect the environment. For example, the preamble of the GATS recognizes the right of governments to regulate the supply of services in order to meet national policy objectives, including environmental protection. Article VI on domestic regulations recognizes the consistency with the GATS of measures of general application to trade in services, which includes regulation to protect the environment, as long as they are administered in a reasonable, objective and impartial manner (it should however be noted that this requirement only applies to sectors where Canada made specific commitments), which includes regulation to protect the environment, would continue to apply. Article VII, which covers recognition requirements related to authorization, licensing or certification of service suppliers, would permit mutual recognition of standards or criteria reflecting more stringent requirements related to environmental protection. Of more specific relevance to environmental protection is the GATS Article XIV, modelled after GATT Article XX, allowing Members to adopt environmental measures necessary to protect human, animal or plant life or health. Article XIV also provides for general measures to secure compliance with laws and regulations that are not inconsistent with the Agreement.

The 1994 Environmental Review concluded that some internationally traded services, notably environmental services, have the potential to make major contributions to sustainable development and environmental protection. It was anticipated that commitments made by Members to bind, reduce or eliminate barriers to access in their markets would open up environmental services to increased competition. It was thought that the development and provision of services related to the environment could enable governments to more easily strengthen their environmental standards.

The 1994 Environmental Review also concluded that Canada had retained the right, by obtaining an exemption from providing most-favoured nation treatment, to take measures that are consistent with its policies on management and conservation of international fisheries.

B. RETROSPECTIVE ANALYSIS

From an environmental point of view, there are two important issues that require a retrospective analysis with respect to the GATS:

i) Whether the GATS has adequately dealt with environmental issues that have arisen under it; and

ii) The role that the Canadian environmental services have played in promoting environmental protection and sustainable development internationally.

i) Has the GATS adequately dealt with environmental issues that have arisen under it?

The 1994 Environmental Review noted that a working party under the Committee on Trade and Environment (CTE) would study the relationship between trade in services and the environment, including the issue of sustainable development. The CTE has studied the relationship and has not yet identified any measure that would not be covered adequately by GATS provisions, in particular Article XIV. The CTE continues to study the issue and relevant information.

A direct environmental benefit from trade liberalization is the reduction of trade barriers for environmental goods and services. On this point, the WTO CTE has noted:

> By promoting the freer flow of environmental goods and services, the removal of trade restrictions and distortions in this sector has the potential to contribute to enhancing environmental quality, as well as expanding markets and new investment opportunities. Environmental goods and services contribute to cost effective, resource efficient and environmentally-sound approaches to resource use, and pollution and waste minimization with subsequent gains in productivity and improvements in the performance of many industries and sectors.[36]

Indirectly, trade liberalization in other service sectors can also contribute positively to sustainable development, by widening the choice of available services, hence allowing consumers to choose the most resource efficient services.

While the liberalisation of some energy-intensive services (e.g., air transport and construction) may have a negative impact on the environment, provisions contained in the GATS ensure that governments retain their ability to take appropriate measures to protect the environment and mitigate these problems. The recognition of the governments' right to regulate in the preamble and the general exceptions for health and environmental protection found in Article XIV provide essential safeguards in that respect.

ii) What role has the Canadian environmental services sector played in promoting environmental protection and sustainable development internationally??

In addition to work being done by the OECD and the WTO CTE, several other international organizations, including the United Nations Conference on Trade and Development (UNCTAD) and APEC have commenced work on delineating the scope of the environmental goods and services industry, the nature and extent of barriers to trade in this sector, and issues relating to public procurement processes.

The environmental services sector, as defined in the GATS, contains four categories: sewerage services; refuse disposal services; sanitation and similar services; and 'other' (various other services such as cleaning of exhaust gases, noise abatement services, nature and landscape protection services, and other environmental protection services).[37] There are, however, other purely environmental or environmental-related services in other parts of the

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36 World Trade Organization, 1998a, para. 32.

37 World Trade Organization, 1999a, p. 25., para. 112-113.

GATS classification system, such as gas, water and electricity distribution services.

The environmental services industry contributes significantly to the Canadian economy. It can also provide a valuable contribution to the protection of the environment abroad. Canadian exports of goods and services have been increasing steadily since the Uruguay Round, and currently total US$ 1 billion, with the United States accounting for 80% of exports of goods and services. Canadian firms have established an excellent reputation internationally for water and waste-water treatment systems, for liquid and solid wastes handling services, and for providing such goods as incinerators, shredders, compactors and recycling equipment.

XI. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS) strengthens the protection and enforcement of intellectual property-rights holders outside their home country. It was determined that Canada's existing intellectual property laws, at the time, for the most part already complied with the TRIPS standards. Canada retained the right to revise its intellectual property laws and practices, including the right to introduce measures to protect the environment.

It was recognized in the 1994 Environmental Review that the Agreement could have environmental implications in two areas: the transfer of environmental technologies and the protection of biological diversity. First, it was thought that by requiring high minimum standards for the protection of the rights of foreign intellectual property holders, the Agreement on TRIPS would encourage the development of environmental technologies; it was thought that improved protection of intellectual property rights could provide exporters with greater security in their foreign dealings, and encourage the transfer of Canadian environmental technology to developing countries. Second, it was noted that the issue of the protection of biotechnology inventions under the Agreement and the protection of biological diversity was unclear. It was expected that environmental issues that might arise from the Agreement on TRIPS would be addressed by the WTO's Committee on Trade and Environment.

Due to the fact that there is significant overlap between the TRIPS Agreement and the GATS with respect to their potential to promote the dissemination of environmental services, the retrospective analysis of how trade liberalization has promoted the dissemination of environmental technologies can be found in Section X on GATS. In order to avoid duplication, this section addresses the issue of whether the TRIPS has in any way hindered the dissemination of environmental technologies.

B. RETROSPECTIVE ANALYSIS

From an environmental perspective, a key issue to address in this retrospective analysis is whether the TRIPS Agreement hindered the transfer of environmental technologies, or conflicted with the objectives of any multilateral environmental agreements.

i) Has the TRIPS Agreement hindered the transfer of environmental technologies, or conflicted with the objectives of any multilateral environmental agreements?

Strong intellectual property rights play an important role in promoting the transfer of environmental technologies, as noted in the 1994 Environmental Review. A key policy question that has gained more attention since the negotiation of the TRIPS Agreement is to what extent, if any, intellectual property rights can hinder the development, access and transfer of environmentally-sound technologies; this is a concern that has been raised mainly by developing countries, and has focussed attention on the compatibility of the TRIPS Agreement and some multilateral environmental agreements that contain provisions on technology transfer.

Some commentators claim that the existence of intellectual property rights relating to environmentally-sound technologies increases the cost of technology (through licensing fees), and thereby prevent developing countries from adopting those technologies. Two points can be made in relation to this concern. First, while intellectual property rights could in some cases have such an effect, proponents for changing the provisions of the TRIPS Agreement have not provided any evidence - specific instances - of where, when or if such problems have actually occurred.

Second, there exists no evidence that the intellectual property rights protection of the TRIPS Agreement, specifically the rights pertaining to patenting and licensing, have hindered the objective of environmental technology transfer as specified in certain multilateral environmental agreements.

Discussions at the CTE on this issue, while limited, have focussed on the need for greater access to environmentally sound technology; and on the provision of incentives for the conservation and sustainable use of biological resources and the equitable sharing of the benefits of their use, including in relation to the knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles pursuant to the UN Convention on Biological Diversity.

XII. THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

A. OVERVIEW OF THE AGREEMENT AND CONCLUSIONS REACHED IN THE 1994 ENVIRONMENTAL REVIEW

The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) strengthened the dispute-resolution system of the GATT 1947 by giving a substantial degree of automaticity to the adoption of the findings of dispute-resolution panels and the Appellate Body. Moreover, the DSU established an integrated system allowing WTO members to base their claims on any of the trade agreements included in the new WTO system.

The 1994 Environmental Review recognized concerns that there is a need for increased transparency and improved procedures for dispute settlement involving trade and environment conflicts. It was expected that panels would be provided access, through the provisions of the DSU, to relevant expertise in the settlement of disputes, including those disputes involving environmental issues. Likewise, it was concluded that by allowing WTO Members to make available to the public non-confidential summaries of the submissions of parties to a dispute, the new DSU would go a long way in increasing transparency in the settlement of trade disputes.

B. RETROSPECTIVE ANALYSIS

A number of key dispute issues were addressed in Section IV - The General Agreement on Tariffs and Trade. One general point worth noting is that the increased effectiveness of the WTO's dispute settlement system (relative to that of the GATT) has brought into still sharper focus the fact that this system is both more elaborate and effective than that found in multilateral environmental agreements (MEAs). This increases the possibility of trade disputes under MEAs being brought to the WTO than being settled under the MEA in question.

A pertinent issue to raise here with respect to the Dispute Settlement Understanding is whether panels have used the opportunity to use relevant expertise in the settlement of disputes involving environmental issues.

i) Have panels taken the opportunity to use relevant expertise in the settlement of disputes involving environmental issues?

In respect to the DSU process a significant development occurred in respect to the *United States - Import Prohibition of Certain Shrimp and Shrimp Products* Panel and the Appeal process. In this case, the United States attached to its appellant's submission amicus curiae briefs submitted from a number of environmental organizations, including the Sierra Club and the Worldwide Fund for Nature. The United States submitted the various NGOs briefs in response to the Panel's ruling that it could not accept information that it had not actively sought. The Appellate Body, reversed the Panel's ruling, holding that Panels could accept information even if that Panel had not requested such information.

The significance of the Appellate Body's interpretation of the DSU is that, while Panels are not *required* to consider submissions from non-parties, environmental NGOs and other parties without legal standing to WTO disputes can now submit information, directly, to Panels, and

Panels can consider this information in reaching their decisions.

It is also becoming the practice of dispute settlement panels to seek the advice of experts when confronted with technical or scientific issues as part of a dispute. Expert review groups, which panels can convene at their discretion under Article 13 and Appendix 4 of the Dispute Settlement Understanding, have already been established in three disputes involving the SPS Agreement. An Expert Review Group was also used by the panel in the Shrimp-Turtle case. This emerging practice suggests that dispute settlement panels are more sensitive to the complexity of the technical/scientific issues put before them.

XIII. SUMMARY AND THE WAY AHEAD

This retrospective analysis of Canada's 1994 Environmental Review of the Uruguay Round has examined each of the agreements originally assessed, and has considered the work of the WTO Committee on Trade and Environment (CTE), and the effects of Article XX in the General Agreement on Tariffs and Trade. The retrospective highlights in each section may be summarized as follows:

- The preambular statement in the Agreement to Establish the World Trade Organization - that Members will endeavour to achieve economic growth in accordance with the objective of sustainable development - affirms the need for trade and environmental objectives to be integrated at the domestic and international levels. The WTO has made appropriate arrangements for cooperation with other intergovernmental organizations and for cooperation and consultation with non-governmental organizations.

- The WTO Committee on Trade and Environment has emerged as the key institutional element within the WTO for exploring the trade and environment nexus in a comprehensive fashion. While the Committee has not gone as far as might have been wished in certain areas, it has helped to identify a number of key trade and environment issues and advanced the understanding of WTO members on these issues.

- Two significant WTO disputes of an environmental nature involving GATT Article XX illustrate the nature of the WTO rules-based system and the importance of non-discriminatory application of domestic environmental protection measures. The reasoning of the Appellate Body in these two cases suggest that, in principle, Article XX provides considerable scope for justifying environmental measures with trade effects, even where those measures are otherwise inconsistent with WTO obligations.

- The Agreement on Agriculture has not interfered with environmentally motivated agricultural support programs in Canada. The Agreement on Agriculture began a process of reducing trade-distorting support and protection and provides a framework under which further reductions can be achieved. Since there was significant policy reform occurring already in Canada, the actual impact of the Agreement on Agriculture has likely been minimal.

- Canada has retained the right to maintain strong environmental policies and regulations, as evidenced by the analysis of the Agreement on the Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. These Agreements have changed the landscape for environmental policy makers in terms of the interaction with trade rules. This has added new dimensions to the environment policy-making process, requiring much more awareness on the part of policy-makers of international developments in fields that were traditionally considered isolated from each other, more consultations and more interdisciplinary analysis, and there has been an increased draw on time and resources as a result. However, this has not proved to be an excessively onerous exercise, and policies and regulations are not compromised in the process.

- The Agreement on Subsidies and Countervailing Measures has not interfered with Canada's support of various environmental initiatives.

- It is noteworthy that under the Dispute Settlement Understanding, Panels have used the opportunity to consider submissions from NGOs and other parties in the dispute settlement process. Panels have also sought the advice of experts when confronted with technical or scientific issues as part of a dispute. This emerging practice suggests that dispute settlement panels are more sensitive to the complexity of the technical/scientific issues put before them.

The 1994 Environmental Review, and this retrospective analysis, focussed on the "regulatory effects" of the Uruguay Round, and not the actual physical impacts of the Uruguay Round on the environment. The 1994 Environmental Review concluded that "the trade liberalizing effect of the Uruguay Round will promote the more efficient allocation and use of resources and thereby contribute to an increase in production and incomes and to a lessening of demands on the environment."[38] This conclusion was based on the assertion that Canada would retain the right to regulate for environmental protection. This retrospective has argued that Canada has indeed maintained its right to regulate for environmental protection.

It is important to underline that this retrospective analysis represents only the first stage of a Strategic Environmental Assessment of the new round of negotiations. It focuses specifically on evaluating the accuracy of earlier findings to help formulate the methodology for assessing the new round. Trade liberalization can affect the environment through direct or indirect scale, technology, structural and regulatory effects. The methodology for the SEA of the new round will adopt a broader approach to the analysis of the potential effects of trade liberalization.

The environmental assessment of a trade agreement is a complex task, and answers to important questions are sometimes elusive. The task is complex because it is often difficult to clearly attribute environmental effects to specific causes. It should be borne in mind, for example, that the implementation of the WTO agreements is occurring in a period of increasing globalization. In assessing the environmental effects of the Uruguay Round, other developments must be considered such as increased international economic integration, the effects of regional trade agreements, and various regional and national political factors. The integrated and complex nature of potential environmental effects of liberalised trade clearly requires a more interdisciplinary analysis in assessments, and greater appreciation for the relationship between international trade rules and domestic regulations. Methodological advances for assessing the potential environmental effects of trade agreements have been made since the 1994 Environmental Review was conducted, and the Canadian assessment of the new round will benefit from these advancements.

A notable example of this progress is how the Canadian process for reviewing the potential environmental effects of the new round of multilateral trade negotiations will be different. Whereas the 1994 Environmental Review was conducted *after* the conclusion of the final negotiations, the assessment of the new round will be conducted *concurrently* with the negotiations. Additionally, broad public consultations will be held throughout the assessment of the new round.

Canada has a commitment to sustainable development. This retrospective of the 1994 Environmental Review represents the first step towards Canada's review of the new round of multilateral trade negotiations. Canada is committed to integrating environmental considerations into the new round of negotiations in an open, transparent, and accountable

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38 Canada, 1994, p. 35.

fashion.

XIV. REFERENCES

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ANNEX 1

LIST OF SELECTED CANADIAN FEDERAL LAWS COVERED BY DISCIPLINES CONTAINED IN THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURE

Fisheries Act: Fish Health Regulations

The Regulations require an import permit for the importation of wild fish, live cultured fish or eggs of wild fish. The Regulations presently apply only to salmonid species. To obtain such a permit, the importer must be granted a certificate, based on an inspection, which lists any diseases or disease agents to be found. The permit is granted if none of these is thought to be harmful to the conservation and protection of fish in the province of importation.

Fisheries Act: General Regulations

The Regulations prohibit the transfer of live fish into a fish rearing facility, or the release of live fish into a fish habitat, if it is determined that, inter alia, the transfer or release of the fish will have an adverse effect on the stock size of fish or the genetic characteristics of Canadian fish or fish stocks.

Canada Agricultural Products Act: Fresh Fruit and Vegetable Regulations

The Regulations prohibit the importation of fresh fruits and vegetables as food if they are contaminated as defined in the Regulations. The Regulations define "contamination" to mean: containing a chemical, drug, food additive, heavy metal, industrial pollutant, ingredient, medicine, microbe, pesticide, poison, toxin or any other substance not permitted by, or in an amount in excess of limits prescribed under the *Canadian Environmental Protection Act*, the *Food and Drugs Act*, or the *Pest Control Products Act*.

The Food and Drugs Act

The Food and Drugs Act is a consumer protection statute dealing with health and safety and economic fraud with respect to food, drugs, cosmetics and medical devices. The legislative focus as it relates to health and safety deals with product integrity.

The Feeds Act

The Feeds Act prohibits the importation of all ingredients, both natural and bio-technological, that are used in livestock feeds which do not meet specified requirements for, inter alia, environmental protection.

The Seeds Act

The Act prohibits the sale of seeds which do not meet specified requirements for, inter alia, environmental protection.

The Pest Control Products Act

The Act prohibits the import of all pest control products that do not meet stringent requirements for, inter alia, environmental protection.

The Fertilizers Act

The Fertilizers Act prohibits the sale of all fertilizers and supplements, including both naturally occurring and genetically modified organisms, that do not meet requirements for, inter alia, environmental protection.

The Health of Animals Act

The Health of Animals Act helps protect human and animal health by controlling diseases and toxic substances in animals and their products. Regulations deter the entry of disease into Canada and allow eradication of diseases that do. Regulations also involve the humane transportation of animals and the purity, potency, efficacy and safety of veterinary biologics.

The Plant Protection Act

The Plant Protection Act was enacted to prevent the importation, exportation and spread of pests injurious to plants and to provide for their control and eradication as well as for the certification of plants and other things.

The Meat Inspection Act

The Meat Inspection Act regulates the import and export of and interprovincial trade in meat products, the registration of establishments, the inspection of animals and meat products in registered establishments and the standards for those establishments and for animals slaughtered and meat products prepared in those establishments.

The Fish Inspection Act

The purpose of the Fish Inspection Act is to develop standards for the quality, safety and identity of fish and fish products and to ensure compliance with these standards.

ANNEX 2

LIST OF SELECTED CANADIAN FEDERAL LAWS THAT ARE COVERED BY THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE'S DISCIPLINES ON REGULATIONS

Canadian Environmental Protection Act: Diesel Fuel Regulations

The Regulations require that importers of diesel fuel report quarterly, and keep 5 years' records of volume of fuels imported and the concentration of sulphur by weight in said fuel.

Canadian Environmental Protection Act: Gasoline Regulations

The Regulations prohibit the importation of gasoline containing a concentration of lead greater than 5 mg per litre, other than for specified specialty uses. The Regulations require that the levels of phosphorus in unleaded gasoline imports not exceed 1.3 mg per litre.

Canadian Environmental Protection Act: Benzene in Gasoline Regulations

The Regulations prohibit the sale of gasoline with benzene concentrations exceeding 1.0% by volume. Importers must keep certain records of all batches imported.

Canadian Environmental Protection Act: Export and Import of Hazardous Wastes Regulations

The Regulations require that a hazardous waste may only be exported from or imported into Canada in compliance with the provisions of Section 6 and 12 of the Regulations.

(1) With respect to Canadian exports, the country of import or transit must not have notified Environment Canada that the importation of that hazardous waste into that country is prohibited; with respect to Canadian imports, the province of import must notify Environment Canada that the importation of that hazardous waste into that province is allowed under its laws, and consent of the competent authority in any country of transit has been successfully solicited.

(2) With respect to both Canadian exports and imports, the country of import or export must be a party to the Basel Convention on The Control of Transboundary Movements of Hazardous Waste and Their Disposal or the Canada-United States Agreement on the Transboundary Movement of Hazardous Waste and Their Disposal.

(3) With respect to both Canadian exports and imports, the importing and exporting entities must have a written contract with certain specified characteristics and undertakings.

(4) With respect to both Canadian exports and imports, the goods to be exported or imported must be properly packaged and labelled.

(5) With respect to both Canadian exports and imports, both the importer and exporter of the hazardous waste must give notice within one year of their intent to do so. Importers must notify Environment Canada, and exporters must notify the official point of notification in the country of import.

Export and Import Permits Act: Export of Logs Permit

The Act requires that exporters obtain permits for all kinds of wood. Permits will only be granted for peeled logs of less than 11 inches top in diameter.

Canadian Environmental Protection Act: PCB Waste Export Regulations

The Regulations prohibit the export of PCB waste for any purpose other than disposal. Conditions which must be met are the those specified in the *Export and Import of Hazardous Wastes Regulations*.

Canadian Environmental Protection Act: Ozone-depleting Substances Products Regulations

The Regulations prohibit the import of more than 10kg of any chlorofluorocarbon in a pressurized container. Exceptions apply for specialty uses and essential uses as defined under the Montreal Protocol on Substances which Deplete the Ozone Layer. Also exempted are chlorofluorocarbons in certain azeotropic mixtures, used as refrigerants. The Regulations prohibit the importation of any container or packaging material for food or beverages that is made of plastic foam in which any chlorofluorocarbon has been used as a foaming agent. Imports from non-parties to the Montreal Protocol, where they contain any chlorofluorocarbons or bromofluorocarbons, are prohibited.

The Regulations prohibit the export to or import from non-parties to the Montreal Protocol of certain controlled ozone-depleting substances. Certain exceptions apply, as for essential uses as defined under the Montreal Protocol. Transferable consumption allowances are established for those current users of controlled substances; prohibitions for each substance are applicable over specified timetables. Imports or export of recovered, recycled, reclaimed or already used controlled substances are allowed by the granting of a permit, where the proposed import or export does not contravene the terms of the Montreal Protocol or other laws of Canada.

Canadian Environmental Protection Act: Ozone-depleting Substances Regulations

The Regulations prohibit the importation and exportation of methyl bromide, whether contained or not in a manufactured product, unless specifically authorized by Environment Canada.

Canadian Environmental Protection Act: Prohibition of Certain Toxic Substances Regulations

The Regulations prohibit the import of all toxic substances listed in Schedule I of the Act, which is periodically amended.

Canadian Environmental Protection Act: Toxic Substances Export Regulations

The Regulations cover exports of substances listed in Schedule II of the Act. Before export, exporters must notify Environment Canada as required in UNEP's London Guidelines for the Exchange of Information on Chemicals in International Trade.

Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act: Wild Animal and Plant Trade Regulations

The Regulations prohibit all imports of plants or animals or derivatives thereof listed under Appendices I-III of the Convention on International Trade in Endangered Species of Fauna and Flora, pursuant to the conditions and requirement of the Convention. The Act prohibits the import into Canada of any animal or plant that was taken, or any animal or plant, or any part or derivative of an animal or plant, that was possessed, distributed or transported in contravention of any law of any foreign state.

Motor Vehicle Safety Act: Motor Vehicle Safety Regulations

The Regulations prohibit the importation of light-duty vehicles and trucks, heavy-duty vehicles, heavy-duty engines and motorcycles that do not meet the emissions standards for the vehicle's model year.